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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1118

EXQUISITE FORM BRASSIERE, INC., a Corporation,
Petitioner

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Exquisite Form Brassiere, Inc., prays that this Court grant rehearing of its order of May 31, 1966 denying the Petition for Writ of Certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit in the above-entitled cause as prayed for in the Petition filed March 14, 1966 in this proceeding.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Subsequent to this Court's Order of May 31, 1966 denying the Petition for Certiorari herein, the Court of Appeals for the Fifth Circuit on June 13, 1966 rendered decisions in the cases of *Callaway Mills Co. et al.* v. *Federal Trade Commission* (No. 21499) and *Cabin Crafts, Incorporated* v. *Federal Trade Commission* (No. 21500) in a joint opinion.[1] This opinion is of substantial and controlling importance and represents a direct conflict with the decision of the Court of Appeals for the District of Columbia Circuit in *Exquisite Form,* the instant case.[2]

The Fifth Circuit in the two cases alluded to above was called upon to construe the meeting competition defense of Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act. The Circuit Court of Appeals for the District of Columbia in the instant case had the same task. Both courts were called upon to determine the propriety of adopting a plan or system to meet competition posed by competitors' plans or systems. Unlike the District of Columbia Court of Appeals, the Fifth Circuit specifically ruled that Section 2(b) *does allow the adoption of a system or plan* and such system or plan may properly be insulated from any illegality by virtue of the meeting competition defense.

The basis of the conflict existing between the two circuit courts turns upon the proper construction of

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[1] The joint opinion in these two cases is reprinted in Appendix A, *infra.* The opinion has not yet been reported.

[2] The opinion of the Court of Appeals for the District of Columbia Circuit is reprinted in Appendix B, *infra.* The opinion has not yet been reported.

this Court's decision in *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945) and related cases. The Fifth Circuit in *Callaway Mills* rejected the interpretation of *Staley* adhered to by the Commission; however, the Commission's interpretation was upheld by the Court of Appeals in the instant case. Specifically, the Fifth Circuit stated that

> "We have found no authority which holds that in all circumstances the allowance of volume discounts according to a plan or 'system' as distinguished from 'individual competitive' responses is condemned per se. Clearly this is not a 'basing-point' case. *FTC* v. *Standard Oil Co.* 355 U.S. 396 (1958). It is only when no 'reasonable and prudent person' would conclude that the adopted system is a reasonable method of meeting the lower price of a competitor that it is condemned. That decision must be made on a case-by-case basis. The adoption of the competitor's system in *Staley* and *Cement* had the effect of raising prices to certain purchasers through 'phantom' freight charges and thus creating *greater* discrimination than necessary. Obviously, that was not a 'good faith' effort. Such is not the case here. Under the totality of the circumstances, the discount system, *thoughtfully tailored by both petitioners to meet their individual problems in the market,* was a mature and reasoned approach to a very real and difficult competitive problem; and petitioners carried their burden of showing 'good faith'." Slip Opinion, pp. 15-16; Appendix A, *infra,* pp. 13a-14a (emphasis in original).

The Circuit Court for the District of Columbia viewed the issue treated above as controlling all of the issues presented by Exquisite Form's appeal:

> "Exquisite Form in the present case essentially premises its position upon the proposition that in

> a Section 2(d) case, if the accused company establishes that its competitors have plans or systems whereby they make advertising allowances to their customers, any company in the industry can combat such systems by inventing and operating a system or plan of its own. Exquisite Form states a number of points, but all of them arise from or are enveloped in the proposition just stated. This, as it phrases the matter, is the crux of the case." See Appendix B, *infra,* p. 19a.

In passing on this issue, the court of appeals in *Exquisite Form* adopted, in a summary fashion, the "traditional" interpretation of *Staley* as espoused through the years by the Federal Trade Commission: Specifically the court stated that

> ". . . the Supreme Court has held [*FTC* v. *A. E. Staley Co.,* 324 U.S. 746 (1945)] that in a price discrimination case (a Section 2(a) case) it is not an effective protection for an accused company to show that it operated a plan or system in order to combat its competitors' plans or systems; in other words, that in those cases *a plan to combat other plans is not an effective defense under the proviso in Section 2(b).*" See Appendix B, *infra,* pp. 19a-20a (Emphasis added).

The court of appeals chose to follow stringently the Commission's interpretation of *Staley,* i.e., that under no circumstances can meeting a plan with a plan be an adequate defense within the meaning of Section 2(b).

2. The *Callaway* decision by the Fifth Circuit obviously has substantial and controlling effect upon the instant case, for there can be no doubt that under the doctrine enunciated by the Fifth Circuit the instant case was wrongly decided by the Court of Appeals for the District of Columbia. In this regard

the Court's attention is respectfully invited to pages 21 through 23 of the Petition for a Writ of Certiorari in this case wherein the same essential considerations were presented which the Fifth Circuit set forth to vindicate the right of a respondent to establish a 2(b) defense by utilizing defensive plans or systems. In particular, petitioner cited Commissioner Elman's dissenting opinion in *Callaway Mills Co.*, CCH Trade Reg. Rep. ¶ 16,800 at 21,761, (Dkt. 7638, 1964). In his dissent it was pointed out that the vice condemned in the *Staley* case was not the use of a system or plan, *per se,* but rather, that the particular system offered in defense was an illegal, collusive price-fixing instrumentality which would have been independently prohibited aside from any Section 2(b) considerations (basing points, phantom freight, etc.).

3. Throughout the *Exquisite Form* proceedings, especially in the Petition for a Writ of Certiorari, petitioner has urged an abandonment of the *per se* approach and an adoption of a rule of reason in construing the parameters of the 2(b) defense. Prior to the *Callaway Mills* and *Cabin Craft* joint opinion, the lodestar of the rule of reason approach had been the decision in *Forster Mfg. Co.* v. *Federal Trade Commission,* 335 F. 2d 47 (1st Cir. 1964) *cert. denied,* 380 U.S. 906. *Forster* enunciated a "common sense" standard. For a discussion of this case, and the rule of reason, see the Petition, pp. 15-16 and the Reply Brief, pp. 9-11.

The recent pronouncement of the Fifth Circuit provides a well reasoned elaboration of how the rule of reason should apply in a context of plan meeting plan. The stark contrast of the *per se* approach taken by the *Exquisite Form* court and the rule of reason approach

taken by the *Callaway Mills* court is clear from the following statements by those courts in discussing plan meeting plan as a defense within Section 2(b). The *Exquisite Form* court of appeals stated that

> ". . . it is not an effective protection for an accused company to show that it operated a plan or system in order to combat its competitors' plans or systems; . . . a plan to combat other plans is not an effective defense under the proviso in Section 2(b)." See Appendix B. *infra,* p. 20a.

The Court of Appeals for the Fifth Circuit in *Callaway Mills* expressly disagreed:

> "We find this reasoning to be erroneous for the following three reasons. First, there is nothing wrong *per se* with *adopting* a 'pricing system' used by competitors. Secondly, the Commission completely disregarded the realities of the competitive conditions prevalent in the carpeting industry. Thirdly, the Commission failed to give proper consideration to the undisputed facts of the case." Slip Opinion, pp. 13-14; See Appendix A, *infra,* p. 12a.

The identity of the issues in *Exquisite Form* and *Callaway Mills* has been recognized by the Commission. The Commission's Reply Brief in the Fifth Circuit quoted the holding just cited in *Exquisite Form* while urging the Fifth Circuit to rule, as the District of Columbia Circuit had done, that *per se,* plan cannot be used to meet plan.[3]

4. In addition to its holding that plan meeting plan is outside the scope of the Section 2(b) defense, the

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[3] The Reply Brief discussed Exquisite Form's argument in the District of Columbia Circuit Court which quoted Commissioner Elman's dissent in the *Callaway Mills* decision by the FTC. To show that Exquisite Form's argument was not accepted by the court, the Reply Brief quoted the court's holding that, *per se,* Section 2(b) does not permit plan meeting plan. See *Cabin Crafts, Inc.* v. *Federal Trade Commission* (5th Cir. No. 21,500), Commission's Reply Brief, pp. 3-4.

Commission, in its *Exquisite Form* decision, added dictum to the effect that even if plan could be met with plan, the plan used by Exquisite Form was unavailing. This conclusion was reached after subjecting the plan to a mechanical comparison of its bare terms and conditions with the many other cooperative advertising plans in evidence. On its face this was a patent attempt, with the benefit of hindsight, to shore up the exclusionary rulings of the hearing examiner which have been catalogued in detail in the Petition herein. See Petition, p. 21, n. 11; see also discussion pp. 20-24.

Petitioner's purpose in attempting to elicit the information noted in footnote 11 of the Petition was to demonstrate that it had acted reasonably and prudently in attempting to meet its competition in good faith. This rule of reason approach would have elicited information tending to establish the marketplace realities extant in the brassiere industry. This is precisely the type of information which would be allowed under the rule of reason approach of the Fifth Circuit in *Callaway Mills.*

Petitioner attempted to adduce proof of its competitors' activities under its rule of reason approach, *inter alia,* by subpoenaing executives of six of its largest competitors as well as an executive of the Advertising Checking Bureau who was a qualified expert in this specialized area.[4] The court dismissed such evidence

[4] The six executives were from the following companies: Jantzen (JA 320), Bali (JA 328), Maidenform (JA 334), Warner (JA 337), Lovable (JA 339), Playtex (JA 348); Advertising Checking Bureau (JA 238). This is in addition to customers who were called. See Reply Brief, n. 6, p. 14. Compare the Brief in Opposition in the instant case, p. 10, wherein it is asserted that "Petitioner requests no subpoenas and made no showing that witnesses were unavailable".

as being insufficient to make out the defense. Thus it is apparent that the court of appeals, like the Commission, was applying a *per se* approach to the defense which is precisely what the *Callaway Mills* decision condemns.

In *Callaway Mills* the court rejected the Commission's traditional empirical approach to the defense of plan meeting plan because it

> "would require the petitioners to engage in *exhaustive* cost studies on the multitude of carpets on the market *before they are actually sold and before any discounts are given.* Such a procedure would be burdensome, unreasonable, and practically unfeasible. Even assuming petitioners could successfully forecast the prices at which their competitors were going to sell, they could not *possibly* determine how much each purchaser would buy during the year from each manufacturer in order to determine the size of the competitor's discount." Slip Opinion, pp. 14-15; See Appendix A, *infra,* p. 13a (Emphasis in original).

Ironically, the reasoning and language of the Fifth Circuit just referenced is virtually interchangeable with the position taken by the petitioner herein when it attempted to show this Court how unrealistic and sophistic the Commission's position has been, both in theory and practice.

> "A seller simply cannot get the type information that the Commission requires. . . .[C]ompetitors provide for cooperative advertising pursuant to multi-termed 'plans', the terms of which change frequently. . . .[M]ost . . . plans require that a series of ads be placed before mathematical calculation of the seller's participation with respect to any one ad is computed. *Not even the seller or his buyer may know what the final allowance is*

going to be. Yet the Commission would require a seller trying to meet his competition to specifically meet the prior offer, i.e., to know what neither his competitor or customer knows." Petition, pp. 16-17 (Emphasis in Petition).

5. *Staley* was decided by this Court in 1945, yet since July of 1964 three different appellate courts have sought to glean from that opinion the meaning of the Section 2(b) defense. These appellate courts have developed two diametrically opposed views on the matter.[5] First, the Court of Appeals for the First Circuit, in *Forster,* reversed the Federal Trade Commission and took a common sense approach in determining the degree of foreknowledge a competitor must have concerning competing offers before responding to them. The linchpin of this common sense approach is the fundamental impossibility of ascertaining with mathematical certitude the realities of a given market and the activities of competitors as required by the Commission's formalistic approach. Next, the Court of Appeals for the District of Columbia Circuit *adopted* the Federal Trade Commission's *per se* approach that plan meeting plan is beyond the scope of the Section 2(b) defense and rejected, as without significance, the standard articulated in *Forster.* Finally, and most recently, the Court of Appeals for the Fifth

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[5] Other Circuits have touched upon whether, *per se,* a plan cannot be used to meet plan. See *Standard Motor Products, Inc.* v. *Federal Trade Commission,* 265 F. 2d 674 (2nd Cir. 1959), *cert. denied,* 361 U.S. 826, questioning the use of a plan to meet a competitor's plan; but see *Balian Ice Cream Co.* v. *Arden Farms Co.,* 231 F. 2d 356 (9th Cir. 1955), *cert. denied,* 350 U.S. 991, *rehearing denied,* 351 U.S. 928, and *General Gas Corp.* v. *National Utilities of Gainesville,* 271 F. 2d 820 (5th Cir. 1959) which favorably discuss plan meeting plan as a defense within the meaning of Section 2(b).

Circuit, in basic agreement with the philosophy of the First Circuit, has refused to enforce the Commission's *per se* rejection of plan meeting plan defenses under Section 2(b) and has met the problem of proof by utilizing a rule of reason based on the fundamental impossibility of competing effectively under the unrealistic standards heretofore imposed by the Federal Trade Commission.

This present posture of a most important aspect of antitrust law pleads for immediate resolution. The immediacy of this need is best demonstrated by a number of pending cases which are being guided by the traditional view of the Commission. Only two weeks ago a hearing examiner applied the Commission-District of Columbia Circuit interpretation of *Staley*:

> "The evidence indicates . . . that Surprise's discriminatory allowances were part of an over-all plan devised by it to combat the plans of competitors (*Exquisite Form* Opinion, pp. 11-16). The Staley rationale—that the use of a plan or system to meet or combat a plan or system of a competitor cannot be justified under Section 2(b) —is just as applicable here as it was in *Exquisite Form.*" *In the Matter of Surprise Brassiere Co., Inc. et al.,* Docket No. 8584, Initial Decision, June 10, 1966, p. 100.

Under the *Forster-Callaway Mills* approach and as urged in the Petition for Certiorari herein, such a casual dismissal of the *only* effective method of competition in the brassiere industry is wholly erroneous because it injects a *per se* approach where only reason can rule.

CONCLUSION

Because of the sharp conflict between the court of appeals in the instant case and the positions taken by the First and Fifth Circuits on the same important question of antitrust law, this petition for rehearing should be granted and a writ of certiorari should issue to the United States Court of Appeals for the District of Columbia Circuit.

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CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

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